TITLE 326 AIR POLLUTION CONTROL BOARD

LSA Document #00-267

SUMMARY/RESPONSE TO COMMENTS FROM THE THIRD COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from July 1, 2001, through July 23, 2001, on IDEM's proposed rule language. IDEM received comments from the following parties:

Ispat Inland Inc.	(III)
David R. Webb Company, Inc.	(DRW)
The Indiana Environmental Group	(IEG)
NiSource	(NIS)
Indiana Electric Utility Air Work Group	(IEUAWG)
Richmond Power and Light Company	(RPL)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: The provision at 326 IAC 2-1.1-3(a) should be deleted and the language of 326 IAC 2-1.1-3(c) should be modified to include operation, in addition to construction or modification. An operation permit or registration should not be required for a listed insignificant activity even if the potential emissions exceed the state permitting thresholds. (IEUAWG) (NIS)

Response: The intent of 326 IAC 2-1.1-3(a) is to ensure that a source does not have multiple units that individually would be exempt but together would require a permit. For an entire source to be exempt, the potential to emit of the total source must not exceed the thresholds for which a registration or permit would be required.

The language at 326 IAC 2-1.1-3(c) is being added by a statutory requirement from P.L. 112-2000 (HEA 1343). P.L. 112-2000 removed the requirement to consider potential to emit for the specifically listed exempt units in 326 IAC 2-1.1-3 with four qualifications. Subsection 8(h) of HEA 1343 allows for the use of potential to emit if the construction or modification would: 1) be subject to PSD requirements; 2) be subject to emission offset requirements; 3) be considered a Title I modification, or 4) result in an increase in potential to emit that would transition the source to a higher level permit. The provision relating to the potential to emit of the entire source falls under the fourth qualification.

The exemptions are intended to relieve the burden on the source and the State of processing modifications for specifically listed small emitting units at minor sources. IDEM removed the references to 326 IAC 2-7-12 from the exemptions because the determination of whether the operation approval is needed for Title V sources must come from 326 IAC 2-7.

No additional changes have been made to this section.

Comment: In 326 IAC 2-1.1-3(c)(1), the language "and 40 CFR 52.21*" is redundant and should be deleted. (IEUAWG) (NIS)

Response: The state PSD rule, 326 IAC 2-2, and the federal PSD rule, 40 CFR 52.21, are both cited because the state PSD program has not been fully approved at this time.

Comment: In 326 IAC 2-1.1-9.5(a), the language should be changed from "The following shall be effective for a term not to exceed five (5) years:" to "The following shall be effective for a term of five (5) years:". Inclusion of the "not to exceed" would restrict IDEM's ability to extend the permit if circumstances warranted its extension. (NIS)

Response: The IDEM must have the authority to issue permits with terms of less than five years. The two main reasons are that PSD permits must expire after eighteen months if construction has not yet commenced and so that modifications existing permits expire concurrent with the original permit. Both the Indiana Code and the Indiana Administrative Code allow for an automatic extension of the term of a permit that would otherwise expire, provided that an timely application for renewal has been made. Neither the language in the proposed rule, nor the language suggested in the comment affect that extension. The comment does not identify any authority for extending the term of a permit beyond five years or a reason for doing so. The suggested language does not provide any additional authority to extend the term of a permit beyond five years.

Comment: In 326 IAC 2-1.1-9.5(b), conditions in the permit to construct that apply to construction, not ongoing operation, should not be required to be retained after construction is completed. (NIS)

Response: Pursuant to federal law, there are conditions, regardless of their nature, that do not expire and must be retained in the permit. However, EPA guidance and IDEM practice allow for obsolete construction-related conditions to be removed in subsequent operating permit actions. Also the IDEM has recommended new language that clarifies that certain conditions expire when modified in future permit actions.

Comment: The language in 326 IAC 2-2-1 should be modified to add the definition of "enforceable" based on the court determination of "practically". (NIS)

Response: The federal rules do not contain a separate definition of "enforceable". The federal rules include a definition of "federally enforceable" that focuses on the "federally" portion of the term versus the "enforceable" portion of the term. Since the goal of this rulemaking is to obtain U.S. EPA approval of the PSD program, IDEM will not add a definition that is not in the federal rules at this time. In general, IDEM will rely on the federal court case (Chemical Manufacturer's Association, et al. v. EPA; 70 F.3d 637, 1995 WL 650098 (D.C. Cir.), 315 U.S. App.D.C. 76) interpretation on what

"enforceable" means and will consider the term enforceable to include anything that is legally and practicably enforceable by U.S. EPA or IDEM. If the federal rules are revised to include a definition in the future, IDEM will consider adopting the definition at that time.

Comment: Given the current available atmospheric modeling tools and their inherent uncertainties, showing no impact will be difficult to demonstrate. In 326 IAC 2-2-1(w)(6)(B)(iii), 326 IAC 2-2-4(b)(1)(A), 326 IAC 2-2-5(b)(1) and 326 IAC 2-2-7(b)(1), it would be more appropriate to modify these subsections to read "have no significant impact in a Class I area or no area where an applicable PSD increment is known to be violated; and". (NIS)

Response: The "no impact" language in 326 IAC 2-2-1(y)(6)(B)(iii) (formerly 326 IAC 2-2-1(w)(6)(B)(iii)) is from the U.S. EPA rules at 40 CFR 51.166(i)(4)(iii)(c) and 40 CFR 52.21(i)(4)(viii)(c). This language has been moved to 326 IAC 2-2-2(f)(3) at U.S. EPA's suggestion. The "no impact" language in 326 IAC 2-2-4(b)(1)(A), 326 IAC 2-2-5(b)(1) and 326 IAC 2-2-7(b)(1) is from the U.S. EPA rules at 40 CFR 51.166(i)(6)and 40 CFR 52.21(i)(6)(i). The language "would impact no area" means that the impact area does not extend to the Class I area or an area where the PSD increment is known to be violated. This language is different than if it read "would have no impact on an area", which would be difficult to demonstrate given the current available atmospheric modeling tools and their inherent uncertainties. The U.S. EPA document, "New Source Review Workshop Manual" (Draft, October 1990), addresses this issue in a manner similar to the commentator's suggestion (Chapter C.IV.B). However, the U.S. EPA has expressed concerns over the use of terms that are not consistent with federal language. In this case, IDEM believes that the continued use of the federal language will allow permits to continue to be reviewed in conformance with past precedence and will avoid a possible approvability issue.

Comment: In 326 IAC 2-2-1(w)(6)(B), the language "conditions from 40 CFR 52.21*" is redundant and should be deleted. (IEUAWG) (NIS)

Response: The phrase "conditions from 40 CFR 52.21" is not redundant. The phrase is included in 326 IAC 2-2-1(y)(6)(B) (formerly 326 IAC 2-2-1(w)(6)(B)) because IDEM did not have a PSD program approved in the State Implementation Plan (SIP) in the past and does not currently have SIP approval for the PSD program. Since IDEM has issued PSD permits under the delegated 40 CFR 52.21 rule in the past, IDEM is using the 40 CFR 52.21 rule citation to indicate that a PSD permit issued under the delegated federal rule or a SIP-approved state rule is acceptable. If IDEM removes the language, the rule would not consider those past PSD permits and any future PSD permits issued under the delegated federal program prior to SIP approval of our own PSD program. Therefore, IDEM will not delete the phrase.

Comment: In 326 IAC 2-2-4(a)(1) addressing air quality analysis requirements for major sources and major modifications, it would be appropriate to include that concept into this subsection by

inserting the phrase "new major stationary" prior to "source". In 326 IAC 2-2-4(a)(2), the word "major" should be inserted prior to the word "modification" in this subsection. (NIS)

Response: IDEM has used the federal language from 40 CFR 51.166(m)(1)(i) and 40 CFR 52.21(m)(1)(i). The applicability of subsection (a) indicates that the applicability of the subsection is for "major stationary sources" and "major modifications". It follows that the subdivisions following subsection (a) refer to the "major stationary sources" and "major modifications" referenced in the applicability of the subsection; therefore, the concept is already included. There is not a definition in the rules for a "new major stationary source", therefore, it would be more confusing to use that term than the current language.

Comment: To avoid confusion in 326 IAC 2-2-4(b)(2)(A), it would be helpful in the descriptive text for ozone in the air quality impact table to clarify the pollutant for which the ambient air monitoring is required. The assumption is that the ambient air monitoring required is for ozone, not VOC or NOx. (IEUAWG) (NIS)

Response: IDEM has used the federal language from 40 CFR 51.166(i)(8)(i) and 40 CFR 52.21(i)(8)(i) . The state ambient air quality standards in 326 IAC 1-3 list ozone as the criteria pollutant, not VOC or NOx. IDEM has recommended new language in 326 IAC 2-2-4(b)(2(A) to clarify this intent.

Comment: The proposed deletion of the Total Suspended Particulate emission increase level in the air quality impact table is appreciated as it recognizes the change in the NAAQS from Total Suspended Particulate to PM10. However, we believe that a corresponding change is needed in 326 IAC 1-3. This is especially important when the provisions of 326 IAC 2-2-4(c)(2) are considered. If this change is not made in 326 IAC 1-3, for consistency with the change in the air quality impact table, the language of 326 IAC 2-2-4(c)(2) would need to be modified to specifically exclude the need to perform ambient air monitoring for Total Suspended Particulate. Similar changes need to be made in 326 IAC 2-2-5(a)(1). (IEUAWG) (NIS)

Comment: In 326 IAC 2-2-5(a)(1), the language of this subsection needs to be modified to specifically exclude Total Suspended Particulate (TSP) if the language of 326 IAC 1-3 is not modified to delete Total Suspended Particulate. (NIS)

Response: The provisions of the state ambient air quality standards in 326 IAC 1-3 are not part of the current rulemaking. IDEM has removed the Total Suspended Particulate (TSP) emission increase levels from the air quality impact table and increment consumption table to reflect the current federal rules in 40 CFR 51.166 and 40 CFR 52.21. Since the purpose of this rulemaking is to obtain U.S. EPA approval of the PSD program and not to update the ambient air quality standards, IDEM will consider the removal of TSP as a criteria pollutant from the ambient air quality standards in 326 IAC 1-3 in a separate rulemaking at a later time. IDEM has recommended new language in 326 IAC 2-2-5 to exempt sources from performing the air quality impact requirements for TSP emissions to maintain

consistency within the state rule.

Comment: In 326 IAC 2-2-6(b)(4)(D)(i), it is unclear why the term "and the U.S. EPA" is necessary if the purpose of the update to these rules is to make the rules approvable by EPA to gain full delegation authority, and the proposed changes are to become self-contained by incorporating all federal requirements. If the program is indeed fully approved and self contained, inclusion of the provision that requires approval by EPA seems inappropriate and unwarranted. Inclusion of EPA appears to be contrary to the intent of having a fully delegated program and therefore recommend it be deleted. (NIS)

Response: The term "and the U.S. EPA" is necessary if the option to extend the time duration of the exclusion for a temporary increase in emissions described in 326 IAC 2-2-6(b)(4)(D) is allowed. The federal rule in 40 CFR 51.166(f)(4)(i) requires that the State Implementation Plan (SIP) can only allow the exclusion if the time period of the exclusion does not exceed two years in duration unless a longer time is approved by the U.S. EPA Administrator. Therefore, if the option is to remain in the rule, the provision "to obtain approval from the commissioner and the U.S. EPA" is necessary. If the rule is revised to remove the allowance for the time extension, the phrase can be removed with the time extension language. The proposed rule contains the flexibility to issue a time extension when warranted.

Comment: Please clarify the intent and applicability of 326 IAC 2-6.1-5(c). It appears that IDEM is eliminating its ability to issue a minor permit, which could be construed to include eliminating its ability to issue a FESOP. If this is the case this provision should be deleted. In light of the federal court ruling that enforceability only has to be "practically enforceable", IDEM should have the authority to limit a source's potential to emit by means of a minor state operating permit (MSOP). (NIS)

Response: IDEM is not eliminating its ability to issue a minor permit, but trying to clarify that true minor sources get MSOPs and sources that request limits on potential to emit rather than Title V permits get FESOPs. In the next rulemaking IDEM will consider removing "federally enforceable", but IDEM believes that the FESOP program is the appropriate permit level for these sources.

Comment: In 326 IAC 2-7-1(21)(A), the insignificant emission thresholds should be based on actual emissions, not potential to emit. Absent that change, the pound per day limits should be set on a daily basis equivalent to the ton per year limits from 326 IAC 2-1.1-3(e)(1). (NIS)

Response: All permitting requirements in Article 2 are based on potential to emit, including the insignificant activity thresholds.

The exemption levels listed in 326 IAC 2-1.1-3 are an element of Indiana's State Implementation Plan for minor new source review (NSR SIP). In the context of the comment, the NSR SIP establishes thresholds that determine whether approval from the IDEM is required prior to beginning construction of a new emissions unit or modification. The ability to review a change prior to construction ensures that the design will protect air quality.

The thresholds established in 326 IAC 2-7-1(21) are an element of Indiana's Title V Operating Permit Program and are lower than the thresholds in the NSR SIP. Again, in the context of the comment, these thresholds determine whether IDEM approval is required prior to operating a new emissions unit. One of the purposes of the Title V Operating Permit program is to ensure that the public has some ability to review or be notified of changes at permitted sources. In general, changes that are exempt under the NSR SIP, but above the thresholds established by Title V may be operated as minor modifications after submitting a complete application. The permit is modified and the public notified after the receipt of the application. Changes that are subject to the NSR SIP are generally subject to the same level of review under the Title V program to the extent that can be accommodated by the separate federal requirements.

IDEM believes that the separate thresholds serve their respective purposes, balancing the protection of air quality, the public interest, and operational flexibility at the permitted source.

Comment: The language in 326 IAC 2-7-1(21)(K)(ii) and 326 IAC 2-7-1(40)(R)(ii) should be clarified. It appears that the new activity or modified activity would not be a modification for purposes of section 12 of this rule if the new or modified activity is currently covered by an applicable requirement in the permit. It does not specify whether the "is currently covered" requires the new or modified activity to be specifically named in the permit. If the IDEM interpretation is that the new activity needs to be specifically named in the permit, the purported flexibility that this provision offers is not really available. If, however, the intent is to indeed provide a way to exclude the new or modified activity from being considered a modification for purposes of section 12 of this rule, then the language should be changed to reflect this intent. One possible solution may be to change "is currently covered by an applicable requirement in the permit" to "would be currently covered by an applicable requirement for this type of activity in the permit". (NIS)

Response: The intent of this provision is to allow insignificant and trivial units to be added to the source without a permit modification as long as the applicable requirements and associated monitoring are contained in the current permit. IDEM has recommended language in 326 IAC 2-7-1(21)(K)(ii) and 326 IAC 2-7-1(40)(A)(ii) to reflect this intent.

Comment: The language proposed in 326 IAC 2-7-1(40)(A)(ii) should be deleted. Incorporating the proposed language that has an emission threshold or cap to compare against to utilize this exemption would significantly increase the level of effort needed for both parties and is counter to the original intent of the list without providing any additional benefit. (NIS)

Response: It is not IDEM's intent to require potential to emit calculations for trivial activities that are listed in 326 IAC 2-7-1(40). The potential to emit need only be considered if the activity is not listed. IDEM has created potential to emit thresholds for the criteria pollutants that match the already approved threshold for hazardous air pollutants. IDEM has recommended new language to reflect that a trivial activity is either one of the listed facilities or an activity with a potential to emit equal to or less

than one (1) pound per day.

Comment: Richmond Power and Light Company requests confirmation that the proposed amendments to 326 IAC 2-7-5(1)(F) will not eliminate its startup/shutdown exemptions previously authorized by IDEM. (RPL)

Response: The requirements in 326 IAC 5-1 and other applicable requirements establish the limitations regarding startup/shutdown activities; removing 326 IAC 2-7-5(1)(F) will not eliminate those exemptions.

Comment: Sources should be allowed to develop alternative emissions limitations applicable to start-up/shutdowns and emergency bypasses on a case-by-case basis in the Title V permit if such conditions meet all applicable requirements. IDEM will include new limits in Title V permits through permit modifications. Alternative limits, requested by a source, should be allowed as well. The 326 IAC 2-7-5(1)(F) provision should be included in the permit modification language. If alternative provisions for start-up, shutdown, and health based emergencies are not included in the regulatory language, sources will be forced into an untenable situation regarding compliance because of a lack of technical or operational solutions to meeting emission limits during these periods. (NIS)

Response: Emergencies are covered on a case-by-case basis by the emergency provisions of 326 IAC 2-7-16. The comment suggests that alternative limitations applicable to start-up and shutdowns and emergency bypasses should be included in permits if the conditions meet all applicable requirements. The IDEM works with applicants to identify conditions under which applicable requirements allow for such limitations and includes them in permits when appropriate. However, the Clean Air Act provides no authority, other than the emergency provisions, to create exemptions or limitations that are not provided by the underlying applicable requirements.

Comment: The commentators strongly object to the deletion of the emergency defense provisions for "health-based" emission limitations. The emergency defense, which provides sources with a defense to enforcement when emissions exceed limits due to circumstances beyond the source's control, are an important legal protection for companies. The commentators recognize that U.S. EPA has requested IDEM to remove this provision. The commentators support IDEM's efforts to maintain this provision in the Indiana rules. Because this provision was not identified as a program deficiency in U.S. EPA's interim approval of the Indiana Title V program, IDEM should request a notice of deficiency from U.S. EPA before it considers any action on this provision. If IDEM is unsuccessful at preserving the emergency defense, IDEM should revise 326 IAC 1-6 and 326 IAC 2-7-16(d) so that the malfunction rules will apply to Title V sources. (III) (IEG)

Response: Part 70 only allows an emergency defense for technology based limitations. U.S. EPA will not allow the defense for health-based limitations and have identified this deficiency in Indiana's program. Health-based standards are based on the assessment of public health risks associated with

certain levels of pollution in the ambient environment and are created for the purpose of maintaining the National Ambient Air Quality Standards (NAAQS). U.S. EPA and IDEM agree to use the enforcement discretion approach for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the source. However, U.S. EPA feels that case law and U.S. EPA policy have consistently recognized that affirmative defenses should not be available for health-based standards. To allow such defense for health-based standards for periods of excess emissions can pose a threat to the NAAQS or otherwise create a risk to public health and could make Indiana's program subject to federal disapproval. The U.S. EPA has indicated that they will soon provide IDEM with written confirmation of their position.

Comment: Richmond Power and Light Company requests that IDEM confirm that opacity by itself is not a "health-based" emission limitation. While a definition exists for "health-based" limitations, its contours are not precise. (RPL)

Response: Opacity is not a health-based emission limitation.

Comment: In 326 IAC 2-7-16(b)(5), the use of the phrase "subdivision (4)" appears inconsistent with the proposed change in 326 IAC 2-7-16(e) from "subdivisions (4) and (5) of subsection (b)" to "subsection (b)(4) and (b)(5)". This should be examined and changed in 326 IAC 2-7-16(b)(5) as appropriate for consistency. (NIS)

Response: The phrase "subdivision (4)" is the correct reference to provision (4) within that subsection. In 326 IAC 2-7-16(e), the reference to "subsection (b)(4) and (b)(5)" is a formatting correction required by the Legislative Services Agency because the reference is to provisions in a different subsection.

Comment: A Minor Source Operating Permit with practically enforceable permit conditions that limit potential to emit to below the Title V thresholds would reduce the resource burden on both the State and the sources. The requirements in 326 IAC 2-7 should be revised to allow the use of Minor Source Operating Permits to limit potential to emit below Title V thresholds and thereby reduce the resource burden on sources as well as the State. If "federal enforceability" is no longer required to limit potential to emit, why is a FESOP the only way to limit potential to emit to below Title V thresholds? If a permit under any Air Pollution Control Board rule limits potential to emit to below Title V thresholds and the permit is practically enforceable, doesn't that accomplish the same purpose as a FESOP? (DRW)

Response: The MSOP is intended for true minor sources and the FESOP program is intended for applicants who request limits on potential to emit rather than apply for a Title V permit. There is a greater compliance burden put on the state for these types of sources. Sources that obtain FESOPs take on an additional applicable requirement, the limit on potential to emit. Sources that obtain FESOPs are, in general, larger sources of air pollution. For both of these reasons, IDEM focuses more

compliance resources on sources with FESOPs than those with MSOPs. Regardless of whether the limits on potential to emit need to be federally enforceable, Indiana's fee structure requires the more significant sources to pay higher fees to support compliance-related activities. Therefore, IDEM believes that the FESOP level of approval is appropriate for reasons other than federal enforceability.

Comment: Indiana's FESOP program was intended to reduce the resource burden on both sources and the State. However, IDEM has elected to issue FESOPs that are identical to the Title V permits, so the FESOP program does not reduce the administrative burden on smaller Title V sources and does not reduce the burden on the State. IDEM has now proposed a rule which prohibits the commissioner from issuing a permit under 326 IAC 2-6.1 that limits potential to emit to below the Title V threshold. IDEM needs to explain its purpose in forcing itself to issue FESOPs when "federal enforceability" is not required to limit potential to emit and the FESOP program does not result in a reduction of the resource burden because IDEM-issued FESOPs are identical to IDEM-issued Title V permits. (DRW)

Response: As discussed in earlier responses to similar comments, the correction to 326 IAC 2-7-2(b)(5)(B) and the changes to 326 IAC 2-6.1 were made to distinguish between true minor sources and sources that have limits on potential to emit. This is consistent with existing language contained in the transition procedures found in 326 IAC 2-5.1-4 and the applicability of FESOPs found in 326 IAC 2-8-2.

There are a number of differences between the FESOP program and the Title V Operating program that reduce the burden on the applicant/permittee. FESOP applicants do not have to identify applicable requirements in their applications. The FESOP rules allow the person who would be considered "responsible official" under the Title V rules to delegate the certification of applications, forms, and reports to a lower level "authorized individual." The annual fee for FESOPs does not include the additional $32 per ton of emissions that are required of Title V operating permit holders. However, the IDEM believes that any permit should serve as an effective compliance tool. That includes appropriate compliance monitoring. Compliance monitoring is one of the prerequisites for the practical enforceability of limits on potential to emit. In general, FESOP sources have more compliance monitoring requirements than MSOPs and less than Title V sources. IDEM is currently developing a policy to reduce the compliance and record keeping/reporting burden on FESOP sources that have demonstrated continuous compliance in the five (5) year permit term. This policy will be implemented with the FESOPs that are being renewed.